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No. 589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

A. MAGNANO COMPANY, a corporation,
Appellant,

vs.

G. W. HAMILTON, as Attorney General of the State of Washington, WALTER J. ROBINSON, as Director of Agriculture of the State of Washington, and CLARENCE D. MARTIN, as Governor of the State of Washington,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLANT

OTTO B. RUPP,
ALFRED J. SCHWEPPE,
Counsel for Appellant.

McMICKEN, RAMSEY, RUPP & SCHWEPPE,
A. M. DAVIS,
W. R. BROWN,
Of Counsel for Appellant.

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OPINION BELOW. *A. Magnano Company v. Dunbar et al.*, reported in 2 Fed. Supp. 417 (R. 41).

JURISDICTIONAL AUTHORITY. An appeal granted October 21, 1933, pursuant to Section 266, Judicial Code, (28 U. S. Code, §380) (R. 70).

STATUTE OF WASHINGTON INVOLVED. Act approved March 9, 1931, Acts of 1931, Chapter 23, page 77.

DATE OF DECREE. August 28, 1933 (R. 64). Petition for Appeal, Assignments of Error and Order Allowing Appeal, October 21, 1933 (R. 65, 68, 70).

NATURE OF THE CASE.

A. Magnano Company, a corporation, sought to enjoin the Attorney General, the Director of Agriculture and the Governor of the State of Washington from enforcing an act passed in 1931 imposing an excise tax of fifteen cents per pound on all oleomargarine sold in the State of Washington, upon the following grounds:

(a) That such tax operated to prohibit and destroy a useful and legitimate business and hence was void under the due process clause of the Fourteenth Amendment.

(b) That the sole purpose of the imposition of the tax was to burden and prohibit the manufacture within and importation into and sale within the State of Washington of oleomargarine, in aid of the dairy industry, a purely private industry, and hence was void in that under the Fourteenth Amendment taxes may only be levied for public purposes.

(c) That such tax imposes an unjust and discriminatory burden upon the appellant in so far as it is engaged in interstate commerce in the purchase and shipment of oleomargarine from without the State of Washington into the State of Washington for the purpose of sale in said state, and hence is void under paragraph 3 of Section 8 of Article I of the Constitution of the United States.

(d) That the imposition of said tax interferes with the power of Congress to levy and collect taxes, duties, imposts and excises, and hence is void under Section 8 of Article I of the Constitution of the United States.

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G. W. HAMILTON, as Attorney General of the State of Washington, WALTER J. ROBINSON, as Director of Agriculture of the State of Washington, and CLARENCE D. MARTIN, as Governor of the State of Washington,
Appellees.

No. 589

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The appellant, A. Magnano Company, is a Washington corporation, which from 1919 to the passage in 1931 of the act here under attack did a large business in the importation into and sale within the State of Washington of an oleomargarine called "Nucoa," its sales of that product throughout that period being not less than 2,000,000 pounds a year and its annual net profits derived from that business being in excess of $20,000 per year (R. 60).

The parties to this litigation stipulated and the court below found that Nucoa has never been sold as butter, that no deception or misrepresentation has

ever been practiced or used in its sale, that its color has always been white, and that it was "a pure, healthful and nutritious article of food with a well established place in the dietary" (R. 57, 58).

Nevertheless, the legislature in February, 1931, passed, and the governor on March 9, 1931, approved, a statute imposing a tax of fifteen cents per pound on all oleomargarine sold within the state (The full text of the statute is printed in the Appendix to this brief; also in the Record, pp. 10-14, and also in 2 Fed. Supp. 417). The act contained a provision (Sec. 15) which declared that an emergency existed because the revenues of the state were insufficient to support the state government and the act would furnish additional and necessary requisite revenues (R 14). The act, therefore, became immediately operative.

Five months after the act became effective the appellant brought this suit in the District Court of the United States for the Western District of Washington, Southern Division, to enjoin the collection of the tax from the appellant and to restrain the enforcement of the statute and its penalties against the appellant.

On September 18, 1931, an amended bill of complaint was filed (R. 10), in which it was alleged that the statute was void as to the appellant for the following reasons:

(a) For the reason that the said act violates the Constitution of the United States and the amendments thereto, in that the threatened enforcement thereof does and will deprive the complainant of its property without due process of law, and does and will deny to

it the equal protection of the laws, in violation of Article XIV of the Amendments to the Constitution of the United States.

(b) For the further reason that taxes under the Fourteenth Amendment may only be levied for public purposes, and that the sole purpose of the purported tax is to burden or prohibit the manufacture within, the importation into and sale within the State of Washington of oleomargarine in aid of the dairy industry, a private business.

(c) For the further reason that said act imposes an unjust and discriminatory burden upon this complainant in so far as it is engaged in interstate commerce in the purchase and shipment of goods from without the State of Washington into the State of Washington for the purposes of sale in said state, all in violation of paragraph 3 of Section 8 of Article I of the Constitution of the United States.

(d) For the further reason that said act violates Article I, Section 8, of the Constitution of the United States, in that said act interferes with the power of Congress to levy and collect taxes, duties, imposts and excises (R. 8[illegible]).

Simultaneously with the filing of the amended bill, appellant made application for an interlocutory injunction, and said application was heard before three judges, as required by Section 266 of the Judicial Code. At the time of the hearing the defendants in said cause filed an answer, which included a motion to dismiss. The three-judge court on February 26, 1932, rendered its opinion denying appellant's application for an interlocutory injunction, but also denying the

motion to dismiss interposed by the said defendants (See, 2 Fed. Supp. 414) (R. 28).

Subsequent to the rendition of the opinion just referred to, this appellant and the defendants entered into a written stipulation of facts, and agreed that the cause should be heard upon the merits upon said written stipulation and such additional testimony as either of the parties desired to offer.

On September 13, 1932, the case came on for final hearing before a three-judge court consisting of the same judges who had heard the application for an interlocutory injunction. The said final hearing was had upon the said written stipulation of facts and testimony so brief that not more than fifteen or twenty minutes was consumed in its taking.

On January 17, 1933, the three-judge court filed its opinion denying the appellant's application for a permanent injunction against the enforcement of the statute complained of and holding that the suit should be dismissed (2 Fed. Supp. 417; R. 41).

Thereafter, owing to a change in the incumbency in office of the defendants, and upon appropriate showing and written consent of their successors, their said successors above named were, by appropriate order, substituted as parties defendant.

Some time later the said three-judge court made its written findings of fact and conclusions of law, all as required by Equity Rule No. 70½, in which findings of fact the said three-judge court incorporated the entire stipulation of facts previously entered into by the parties, and added thereto two additional findings, namely XX and XXI. Parenthetically we may say

that paragraph XX relates to the amount of real estate and personal property taxes paid by the dairy farmers in the state, while paragraph XXI recites *interalia* that *the appellant could not, after the passage of the act, sell any oleomargarine in the State of Washington except at a loss, because the tax of fifteen cents a pound added to what it paid for the product would make the price of oleomargarine higher than that of butter.*

The stipulation of facts and the findings of fact are found in the record at pp. 29-36, and pp. 55-63 respectively, but for the convenience of the court the findings are here set forth:

Findings of Fact

I

"Complainant is a corporation duly organized and existing under and by virtue of the laws of the state of Washington and a resident and citizen of such state and has paid its annual license fee last due the state of Washington.

II

"Defendant G. W. Hamilton is the duly elected, qualified and acting attorney general of the state of Washington and a resident and citizen of said state and of the western district of Washington; defendant Walter J. Robinson is the duly appointed, qualified and acting director of agriculture of the state of Washington and a resident and citizen of said state and of the western district of Washington; and defendant Clarence D. Martin is the duly elected, qualified

and acting governor of the state of Washington and a resident and citizen of said state and of the western district of Washington.

III

"That this is a cause of a civil nature in equity and that the matters in controversy arise under the constitution and laws of the United States and that the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

IV

"That the legislature of the state of Washington at its 1931 session regularly and duly enacted Chapter 23, Laws of 1931, providing for the taxation of sales of butter substitute within the state at the rate of 15 cents per pound.

V

"That complainant for many years immediately prior and up to the enactment of said Chapter 23, Laws of 1931, was engaged in importing into the state of Washington from factories located in the state of California, and thereafter selling to bakeries, confectioners, grocers, institutions and other persons in the state of Washington, an article of trade and commerce known as 'Nucoa.'

VI

"That said Nucoa is classified by the government of the United States as oleomargarine; that the manufacture and sale of oleomargarine for more than thirty years continuously has been regulated by said government and over said

entire period oleomargarine continuously has been and now is recognized by said government as a legitimate, wholesome and healthful article of commerce, and that oleomargarine has been in general use by that name throughout the United States for more than thirty years last past.

VII

"That all things have at all times been, and are, done necessary to make said Nucoa comply with all federal laws and regulations and all laws and regulations of the state of Washington relating to pure foods and the manufacture and sale thereof; and that all things have at all times been, and are, done necessary to make said product comply with all other federal laws and regulations, and all laws and regulations of the state of Washington in any way regulating said article or the persons, firms and corporations engaged in the manufacture, importation and sale of the same. That said product has been continuously on the market for many years, and that it at all times has been and is a pure, wholesome and nutritious food product made from animal and/or vegetable oils or fats emulsified with milk or milk products, to which salt has been addded, and not containing eighty per cent of milk or butter fat; that said Nucoa is now and for many years has been used for cooking, baking, frying and general culinary and household purposes. That all of the materials used in the manufacture of said oleomargarine at all times

have been and are of good quality, and all oils and fats at all times have been and are refined at high temperature so as to insure their purity. That all milk used in the manufacture of said product at all times has been and is heated to a high temperature so as to insure purity before emulsification. That the color of the finished product sold and dealt in by the complainant at all times has been and is white and uncolored. That the resultant product at all times has been and is a pure, nutritious and healthful article of food with a well established place in the dietary. That said product at all times has been and is a wholly original and independent product *sui generis*.

VIII

"That, pursuant to federal laws and regulations, each original twelve-pound package of said product has printed or branded thereon in letters three-fourths of an inch high the word 'OLEOMARGARINE;' that each individual one-pound print contained in said original package is packed in a carton which has printed or branded on the two principal panels thereof the word 'OLEOMARGARINE' in plain, Gothic letters of not less than twenty-point type, which letters are printed in a conspicuous color that forms a strong contrast with the color of said carton; that no device or words are used thereon calculated to mislead the public into believing that the said product is anything other than oleomargarine; that all purchasers of said product are at all

times advised as to the exact nature of the product purchased, viz., that it is oleomargarine; that no deception or misrepresentation is practiced or used in the sale thereof; and that complainant has not sold, and does not intend to sell, said product in the state of Washington except as thus plainly marked and branded and except in accordance with the practice above outlined.

IX

"That at all times prior to the passage of said Chapter 23 of the Laws of Washington of 1931 said oleomargarine so sold by complainant was not sold and advertised as or for butter, but was sold as a wholly original and independent product *sui generis;* and that since the passage of the said act complainant has not had, and does not have, any intention of advertising or selling said oleomargarine as or for butter, but intends to advertise and sell such oleomargarine only as a wholly original and independent product *sui generis.*

X

"That for many years last past and continuously up to the effective date of said act, the average annual sales of oleomargarine in the state of Washington have exceeded 5,000,000 pounds. That of said 5,000,000 pounds approximately 1,300,000 pounds were manufactured within the state of Washington, and approximately 3,700,000 pounds were shipped into the state of Washington from other states in the

United States of America. That all oleomargarine that has been sold by any person, firms and corporations whomsoever in the state of Washington for many years last past and up to March 9, 1931, has had the characteristics and been sold under the conditions described in paragraphs VII, VIII and IX of these findings of fact. That said oleomargarine of complainant and all other oleomargarine sold in the state of Washington at all times up to the passage of said act was sold in direct competition with dairy butter produced in the state of Washington; that thousands of persons of moderate means in the state of Washington purchased said oleomargarine in preference to butter because of the lower cost of oleomargarine; that the total production of dairy butter in the state of Washington during the year 1930 was approximately 33,000,000 pounds, and for a long time prior thereto and up to September 13, 1932, the production of butter in the state of Washington has been at approximately the same rate per annum; that at the time of the passage of said act the wholesale price of oleomargarine in the state of Washington was twenty cents a pound and the wholesale price of dairy butter in the state of Washington was thirty-two cents a pound; that at the time of the passage of said act the retail price of said oleomargarine in the state of Washington was twenty-five cents a pound, and the retail price of buttter in the state of Washington was from thirty-five to thirty-

seven cents a pound; that at the time of the filing of the amended bill the wholesale and retail prices of oleomargarine and butter in the state of Washington were approximately the same as they were at the time of the passage of said act, and were approximately the same throughout the entire period since the passage of the act and up to the filing of the amended bill; that on the 13th day of September, 1932, the wholesale price of butter in the state of Washington was twenty-two cents a pound; and the retail price twenty-four to twenty-six cents a pound; that the import price of Nucoa to complainant on the 13th day of September, 1932, was twelve cents a pound; and that complainant, if it could sell said Nucoa free of said tax, would sell to retail dealers in the state of Washington at fourteen cents a pound, and said retail dealers in the state of Washington would in turn sell said product to the general public at seventeen cents a pound. That in the interval between the filing of the amended bill and September 13, 1932, there was a gradual and continuous decline of both said butter and oleomargarine prices down to said September 13, 1932, in the same general proportion as that above set forth.

XI

"That complainant since the year 1919, and prior and up to the time of the enactment of said statute, did a large business in the importation into, and sale within, the state of Washington.

of said product; and had and still has, within the said state, a large amount of property devoted to said business; that the business of complainant in the state of Washington prior and up to the time of the enactment of said statute was a very profitable one. That complainant since the year 1919 continuously and up to March 9, 1931, had a regularly established business in which it imported from the state of California and sold in the state of Washington not less than 2,000,000 pounds of oleomargarine, viz., Nucoa, a year, and the annual net profits of said business in said state during said period exceeded the sum of $20,000.00 per year. That the gross profits of complainant on the sale of said oleomargarine in said state over said period has continuously averaged two and one-half cents per pound; and that the net profit of complainant on the sale of said oleomargarine in said state has continuously been one cent per pound. That for the years 1929 and 1930 and for the year 1931 up to March 9, 1931, said importation and sales of oleomargarine by the complainant in the state of Washington were as follows:

Year	*Pounds Sold*
1929	2,522,762
1930	2,116,056
1931 up to March 9	475,815

That since March 9, 1931, complainant by reason of said tax of fifteen cents per pound, and defendants' continuous threats to enforce the same has not imported from the state of California

and sold any oleomargarine whatsoever; nor has any other person, firm or corporation falling within the terms of said act produced, refined, manufactured or compounded and thereafter sold such oleomargarine in the state of Washington for use and sale in the state of Washington, or imported into or sold in the state of Washington any such oleomargarine.

VII

"That since the effective date of Chapter 23, Laws of 1931, no revenue has been received by the state of Washington under the provisions of said act for the reason that, since said date, no sales of oleomargarine subject to tax under said act have been made; that since the effective date of said act no applications have been made to the collector of internal revenue of the United States in the state of Washington for wholesale or retail licenses under the federal statutes to sell oleomargarine in the state of Washington, nor have any such wholesale or retail dealers' licenses been issued to dealers in the state of Washington under said federal statutes since such date, nor has the government of the United States derived any revenue from sales of oleomargarine within the state of Washington since such date.

XIII

"That for a long time prior to and up to the time said act imposing a tax of fifteen cents per pound became effective, complainant imported into the state of Washington said Nucoa at a cost

of seventeen cents per pound, and sold said product to retail dealers in the state of Washington at twenty cents per pound, who, in turn sold said product to the general public at twenty-five cents per pound; that at all times since the effective date of said act up to the time of filing the amended bill the price per pound at which complainant could import said product and, if not taxed under said act, could sell the same to retail dealers, and the price per pound at which retail dealers in the state of Washington could resell to the general public has remained the same, and that since the date of filing the amended bill down to September 13, 1932, there was a gradual decline in said respective oleomargarine prices to the extent hereinbefore set forth. That these facts apply without substantial variations to all other persons, firms and corporations engaged in manufacturing, importing and/or selling oleomargarine within the state of Washington.

XIV

"That defendants and their respective predecessors in office have at all times since the effective date of Chapter 23, Laws of 1931, threatened and continue to threaten to enforce against complainant and all others similarly situated a tax of fifteen cents per pound on all oleomargarine sold by them within the state of Washington. That the defendants state that it is their intention to enforce said Chapter 23 of the Laws of 1931 against all sales of oleomargarine that

may be made by complainant and all others similarly situated, both by the tax provided in said enactment and the highly penal provisions thereof.

XV

"That complainant brings this suit on its own behalf and on behalf of all other persons, firms or corporations similarly situated, who may care to intervene and joint in the expense of this proceeding. That the complainant has no adequate remedy at law.

XVI

"That dairying is one of the basic industries of the state of Washington; that the state comprises 66,811 square miles of land upon which there are 40,800 dairy farms comprising in excess of 250,000 acres of improved farm land besides innumerable lesser farms devoted partially to the production of butter and other dairy products.

XVII

"That according to the official report of the state department of agriculture for the calendar year 1930, there were in the state during said year a total of 306,000 dairy cows with a production as follows:

Milk	1,794,384,000 pounds
Creamery butter	32,925,707 pounds
Ice cream	3,598,466 gallons
Cheese	8,264,332 pounds
Evaporated and condensed milk	54,545,568 pounds

Value of by-products, condensed and powdered skim milk, buttermilk and casein	$1,514,000.00

XVIII

"That the same report for the calendar year 1929 shows that there were in the state during said year a total of 290,000 dairy cows with a production as follows:

Milk	1,708,026,403	pounds
Creamery butter	29,804,070	pounds
Ice cream	5,425,523	gallons
Cheese	6,788,283	pounds
Evaporated and condensed milk	41,610,900	pounds
Value of by-products, condensed and powdered skim milk, buttermilk and casein	$3,203,086.85	

XIX

"That the report for 1930 shows that the total value of cows and farm lands and equipment necessary for their maintenance during such year was $183,600,000, not including creameries, condenseries and other similar properties.

XX

"That the real estate taxes paid by the farmers of the state of Washington on properties used to raise forage and feed for their cows are $8,436,482, and on personal property $2,402,272.

XXI

"That the complainant, after March 9, 1931, could not have sold any oleomargarine in the state of Washington except at a loss, because the said tax of fifteen cents per pound added to complainant's cost would make the price of oleomargarine higher than that of butter. There is no proof that the tax does not give a reasonable profit on cost of manufacture or on capital invested." (See 2 Fed. Sup. 417 at 422)

SPECIFICATION OF ERRORS

The errors assigned in the record (R. 68) which appellant intends to urge and upon which it relies for reversal of the decree of the three-judge court dated Aug. 28, 1933, are:

I

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the excise tax sought to be imposed by Chapter 23 of the Laws of 1931 of the State of Washington violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that it levies a tax confiscatory in amount and has destroyed complainant's business.

II

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the excise tax sought to be imposed by Chapter 23 of the Laws of 1931 of the

State of Washington violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that under the due process clause of the Fourteenth Amendment taxes may be levied only for public purposes, and that the sole purpose of the purported tax is to burden or prohibit the manufacture within, the importation into, and sale within the State of Washington of oleomargarine in aid of the dairy industry, a purely private business.

III

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the said enactment of the State of Washington violates the commerce clause of the Constitution of the United States (Paragraph 3 of Section 8 of Article I); in that said act imposes an unjust and discriminatory burden upon this complainant in so far as it is engaged in interstate commerce in the purchase and shipment of goods from without the State of Washington into the State of Washington for the purposes of sale in said state.

IV

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the said enactment of the State of Washington constitutes an unconstitutional interference with the taxing power of the Government of the United States granted by Article I, Section 8, of the Constitution of the United States, in that said act interferes with the power of Congress to levy and collect taxes, duties, imposts and excises, and has,

without producing any revenue whatsoever for the State of Washington, completely destroyed, as found in the Findings of Fact, all federal revenue from the sale of oleomargarine within the State of Washington, under applicable acts of Congress.

ARGUMENT

The Findings of Fact show that the Washington Act completely destroyed this legitimate business of appellant.

These facts are admitted and indisputable: The appellant is not a manufacturer of oleomargarine. It had, however, for more than twelve years prior to the passage of the act in question been purchasing in California an uncolored oleomargarine known as Nucoa. It imported this product and sold it in the State of Washington, its annual sales of the product being in excess of 2,000,000 pounds, and its annual net profits derived from the business being in excess of $20,000 per year. The product imported and sold was a pure, healthful and nutritious article of food, and was so recognized by the United States Government for many years. Every person who bought the product knew what it was, knew that it was not butter. No misrepresentation or deception was practiced in its sale, nor was anything done, either by the appellant or other sellers of oleomargarine in the state, calculated to deceive anybody. While the product was not butter, was not represented as butter, yet, nevertheless, it competed with dairy butter. It was able to compete

with dairy butter because thousands of persons of moderate means preferred to buy it because of its lower cost.

When the act complained of was passed in March, 1931, the wholesale price of oleomargarine in the state was 20c a pound and the wholesale price of butter 32c a pound, a difference of 12c. At the same time the retail price of oleomargarine was 25c a pound and the retail price of butter 35c to 37c a pound, or a difference of 10c to 12c. All these prices remained approximately the same until the filing of the amended bill on September 18, 1931, about six months after the act went into effect. On September 13, 1932, the date of the final hearing, almost a year after the filing of the amended bill, the wholesale price of butter in Washington was 22c a pound, while the appellant had to pay for oleomargarine 12c, a difference of 10c. On the same date the retail price of butter was 24c to 26c a pound, while the appellant, if it could have sold oleomargarine free from tax, would have sold it to retail dealers at 14c a pound, and the retailers would, in turn, have sold it to the consuming public at 17c a pound. In the interval between the filing of the amended bill and the date of the final hearing there was a gradual and continuous decline of both butter and oleomargarine prices in the same proportion as that just set forth.

It is thus apparent that viewed from any angle the spread in price between butter and oleomargarine was never greater than 12c a pound throughout the entire period.

The imposition of a tax of 15c a pound, therefore

instantly and completely destroyed the oleomargarine business in the State of Washington.

The findings recite:

> "That since March 9, 1931, complainant by reason of said tax of fifteen cents per pound, and defendants' continuous threats to enforce the same has not imported from the State of California and sold any oleomargarine whatsoever; nor has any other person, firm or corporation falling within the terms of said act produced, refined, manufactured or compounded and thereafter sold such oleomargarine in the State of Washington for use and sale in the State of Washington, or imported into or sold in the State of Washington any such oleomargarine." (Finding of Fact XI)

Finding of Fact XII recites that since the date of the approval of the act the State of Washington has not received a dollar under the terms of the act, that no sales of oleomargarine subject to the tax under the act have been made and no applications have been made to the Collector of Internal Revenue of the United States in the State of Washington for either wholesale or retail licenses to sell oleomargarine, that no such licenses have been issued to dealers in the state, and that the Government of the United States has received no revenue from oleomargarine sales within the state.

Finding of Fact XXI in part reads as follows:

> "That the complainant, after March 9, 1931, could not have sold any oleomargarine in the State of Washington *except at a loss*, because the

said tax of fifteen cents per pound added to complainant's cost would make the price of oleomargarine higher than that of butter."

A state may not consistently with the due process clause of the Fourteenth Amendment completely destroy a legitimate business.

Parenthetically we may say that this precise question was presented to, but not decided by, this court in the recent case of *Glenn v. Field Packing Co.*, 54 Sup. Ct. Rep. 138.

The findings put beyond all possibility of doubt that the business destroyed was a lawful one, because it cannot be illegitimate to sell openly and without misrepresentation or deception a pure, nutritious and healthful article of food and one recognized as such by the United States Government itself. If such a business is illegitimate, it is difficult, if not impossible, to conceive of a lawful business. Not only do the findings declare the business a lawful one, but such also is the holding of this court.

In *Schollenberger v. Pennsylvania*, 171 U. S. 1, 9, this court said:

> "This act shows that Congress at the time of its passage in 1886 recognized the article as a proper subject of taxation and as one which was the subject of traffic and of exportation to foreign countries and of importation from such countries. *Its manufacture was recognized as a lawful pursuit*, and taxation was levied upon the manufacturer of the article, upon the whole-

sale and retail dealers therein, and also upon the article itself."

But surely it cannot be unlawful to sell, without deception or misrepresentation, a pure, nutritious and wholesome article of food which it is "lawful to manufacture."

Again, in *Collins v. New Hampshire*, 171 U. S. 30, 33, this court condemned a statute which was declared to be

> "a mere evasion of the direct prohibition contained in the Pennsylvania statute,"

and which last statute was declared void in the *Schollenberger* case.

Three of the greatest dairy states in the country are Wisconsin, New York and Minnesota. In the case of *John F. Jelke Co. v. Emery*, 193 Wis. 311, the court said:

> "The courts now take judicial notice of the fact that oleomargarine is a healthful, nutritious food. *Braun & Fitts v. Coyne* (C. C.) 125 Fed. 331; *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; *State v. Hanson*, 118 Minn. 85, 40 L. R. A. (N. S.) 865, 136 N. W. 412, Ann. Cas. 1913E, 405."

In *State v. Hanson*, 118 Minn. 85, the Supreme Court of Minnesota, after stating the effect of the decisions in the *Schollenberger* and *Collins* cases, said:

> "Since these decisions there has been no case denying the right of oleomargarine to be classed as a wholesome food product or upholding any prohibitory law."

In a somewhat early decision in New York, *People*

v. Marx, 99 N. Y. 377, cited in *Schollenberger* case (171 U. S. 1, 11) the court recites a portion of the testimony adduced in that case, and relating to the character of oleomargarine, as a food product. It then says:

> "Further testimony as to the character of the article being offered, the district attorney announced that he did not propose to controvert that already given. Testimony having been given to the effect that oleomargine butter was precisely as wholesome as dairy butter, it was, on motion of the district attorney, stricken out, and the defendant's counsel excepted.
>
> "The broad ground was taken at the trial, and boldly maintained on the argument of this appeal, that the manufacture or sale of any oleaginous compound, however pure and wholesome, as an article of food, if it is designed to take the place of dairy butter, is by this act made a crime. The result of the argument is that if, in the progress of science, a process is discovered of preparing beef tallow, lard, or any other oleaginous substance, and communicating to it a palatable flavor, so as to render it serviceable as a substitute for dairy butter, and equally nutritious and valuable, and the article can be produced at a comparatively small cost, which will place it within the reach of those who cannot afford to buy dairy butter, the bar of this statute is upon it."

The product sold, therefore, being nutritious and wholesome, the manufacture of it lawful, the sale

made without deception or misrepresentation, and the business of selling it legitimate, may the state destroy it?

In *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, this court considered a statute of Pennsylvania prohibiting the use of "shoddy" in the manufacture of comfortables, even when the shoddy was sterilized. Palmer Bros. Co., which had for many years been selling in Pennsylvania comfortables made of shoddy, brought a suit to enjoin the operation of the statute on the ground that it was in violation of the due process clause of the Fourteenth Amendment. A preliminary injunction having been denied, an answer was filed and a trial had "at which much evidence was introduced." What the evidence was on behalf of the enforcing officer is not precisely disclosed by the opinion, but the fair inference from the argument made on his behalf is that he contended that comfortables so made might be insanitary and were sold by fraudulent and deceitful means to the consuming public. This court held, however, that the record disclosed that shoddy might be rendered harmless by disinfection or sterilization, and that the manufacturer in that case used effective steam sterilizers.

You said (pp. 412, 415):

> "Shoddy-filled comfortables made by appellee are useful articles for which there is much demand. And it is a matter of *public concern* that the production and *sale* of things *necessary* or *convenient* for use should not be *forbidden*. They are to be distinguished from things that the State

is deemed to have power to suppress as inherently dangerous. * * *

"The constitutional guaranties may not be made to yield to mere convenience. *Schlesinger v. Wisconsin*, *ante*, p. 230. The business here involved is *legitimate* and *useful;* and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is *purely arbitrary* and *violates the due process clause of the Fourteenth Amendment. Adams v. Tanner*, 244 U. S. 590, 596; *Meyer v. Nebraska*, 262 U. S. 390; *Burns Baking Co. v. Bryan*, 264 U. S. 504."

But if a state may not prohibit the sale within its borders of comfortables made from shoddy when such shoddy is sterilized, *a fortiori*, it may not prohibit the sale of oleomargarine, a product which was held by the court of last resort of New York, nearly fifty years ago, to be a wholesome article of food, and the manufacture of which this court declared, as long ago as 1897, was a lawful pursuit and so recognized by Congress.

Moreover, it does appear from the *Weaver* case that there may be some danger to health from the use of "shoddy" comfortables unless properly sterilized. Antecedent treatment of the materials composing the comfortables is, therefore, necessary in order to make them safe for human use. All the experience of the past fifty years, however, has demonstrated that oleomargarine is not deleterious, but on the contrary, that it is a wholesome food. Since 1897 "there has been

no case denying the right of oleomargarine to be classed as a wholesome food product." Even if there were no judicial declaration on the subject, it would seem that a product of which over 5,000,000 pounds were sold annually in the State of Washington prior to 1931 (the state being only twenty-sixth in point of population) and a product on which the United States Government has collected for several years a tax on an annual consumption in excess of 300,000,000 pounds (of which fact this court will take judicial notice; *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Nigro v. United States*, 276 U. S. 332) cannot be anything but a wholesome and nutritious food article, one which serves a vital public need and of which thousands of persons of moderate means in the State of Washington ought not to be deprived of the right to buy.

But if the sale of "shoddy" comfortables may not be forbidden because such comfortables are "necessary or convenient for use" surely the state cannot forbid the sale of a wholesome and nutritious food used by thousands of people of moderate means.

This conclusion is fortified, if it needs fortification, by the decision of this court in *Adams v. Tanner*, 244 U. S. 590, where it appears that the State of Washington passed an act which asserted that employment agencies which exacted a fee from workers for furnishing them employment were "detrimental to the welfare of the state," and forbade, under penalty of fine and imprisonment, the exaction of such a fee by such agencies. Certain employment agencies filed a

bill to enjoin the enforcement of the act. A statutory court dismissed the bill, but on appeal this court held the statute invalid on the ground that it attempted to prohibit a "service useful, commendable and in great demand." It was argued in support of the constitutionality of the measure that while such an agency "may be beneficial to some particular individuals, or in specific cases, economically it is certainly non-useful, if not vicious, because it compels the needy and unfortunate to pay for that which they are entitled to without fee or price, that is, the right to work." In reply to this contention, however, this court declared that while abuses might grow up and probably had grown up in connection with such agencies, and therefore there was adequate reason for hedging them about by proper regulations, nevertheless,

> "* * * this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution *cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.*"

This court then quoted from *Allgeyer v. Louisiana*, 165 U. S. 578, 589, the following:

> "'The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; *to earn his livelihood by any lawful calling; to pursue any livelihood or avocation*, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned'."

As stated, this court in that case recognized that it was probable that abuses existed in connection with employment agencies. Nevertheless, the holding was that the business could not be prohibited.

In the case at bar it is not asserted by anyone that abuses exist in the sale of oleomargarine. On the contrary, the findings of fact expressly put out of view any such consideration. If a state cannot prohibit a business, even though it is probable that abuses exist in connection therewith, how can it prohibit a business indisputably lawful and free from all abuses?

In *New State Ice Co. v. Liebmann*, 285 U. S. 262, 278, this court again announced the applicable principle.

> "Plainly, a regulation which has the effect of *denying* or unreasonably curtailing the *common*

right to engage in a *lawful private business*, such as that under review, cannot be upheld consistently with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily [to] interfere with private business or *prohibit lawful occupations* or impose unreasonable and unnecessary restrictions upon them.' *Burns Baking Co. v. Bryan*, 264 U. S. 504, 513, and authorities cited; *Liggett Co. v. Baldridge*, 278 U. S. 105, 113."

We have already quoted from the opinions in the cases of *People v. Marx*, 99 N. Y. 377, *J. F. Jelke Co. v. Emery*, 193 Wis. 311, and *State v. Hanson*, 118 Minn. 85, all of which hold that oleomargarine is recognized as a pure, wholesome and nutritious food, and all of which further hold that an act prohibiting its sale is in violation of the Fourteenth Amendment.

In the recent case of *Ex parte Bock*, 125 Cal. App. 375, it is said:

"It is further conceded that an ordinance purporting to prohibit the manufacture or sale of oleomargarine would be unconstitutional (*Jelke Co. v. Emery*, 193 Wis. 311, 214 N. W. 369, 53 A.L.R. 463; *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; see also, *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, 46 S. Ct. 320, 70 L. ed. 654), and that any ordinance indirectly accomplishing that result by means of imposing a tax in such amount as to be prohibitory would likewise be unconstitutional. In *re Dees*, 50 Cal.

App. 11, 194 P. 717; *Merced County v. Fleming*, 111 Cal. 46, 43 P. 392."

Several answers were attempted to be made to the foregoing argument in the court below, and as they will doubtless be repeated here, we consider them briefly.

Powell v. Pennsylvania Distinguished

(a) It was asserted, though halfheartedly, that the decision in *Powell v. Pennsylvania*, 127 U. S. 678, was still controlling and that a state might prohibit outright the sale of oleomargarine. The *Schollenberger* and *Collins* cases would seem to have foreclosed that contention. But if, despite those decisions, any possible doubt existed as to the inability of the state to prohibit the sale of oleomargarine, that doubt has been removed by what was said in *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, at p. 414:

> "'Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way.' *Quong Wing v. Kirkendall*, *supra*, 64. This is well illustrated by the *Powell* case compared with *Schollenberger v. Pennsylvania*, 171 U. S. 1. Every opinion is to be read having regard to the facts of the case and the question actually decided. *Cohens v. Virginia*, 6 Wheat. 264, 399. The facts clearly distinguish this case from the *Powell case*. There, it was *assumed* that most kinds of oleomargarine in the market were or might become injurious to health. Here, it is established

that sterilization eliminates the dangers, if any, from the use of shoddy."

There can be no assumption in this case than any oleomargarine sold in the State of Washington for many years might become injurious to health, because the explicit finding is "that all oleomargarine that has been sold by any persons, firms and corporations whomsoever in the State of Washington for many years last past and up to March 9, 1931, has had the characteristics and has been sold under the conditions described in paragraphs VII, VIII and IX of the findings of fact." Findings of fact VII, VIII and IX declare, in substance, that all oleomargarine sold in the state has been honestly manufactured, that the product is a pure, healthful and nutritious food, and has been sold under circumstances which do not permit of deception or misrepresentation.

A state cannot, under the guise of a prohibitive tax, destroy a lawful business.

(b) The second contention made in the court below was that even though the state could not directly prohibit the sale of oleomargarine, yet as the challenged act is an alleged revenue measure the fact that the tax levied thereby is so high as to absolutely destroy the business is wholly immaterial.

But courts are not bound by mere form, are not to be misled by mere pretense. They may look into the substance of things whenever they enter on an inquiry of whether the legislature is transcending the limits of its taxing power. The purpose and limit of any

act must be determined by its nature, and "its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted" (268 U. S. 283).

In *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237, it is said:

> "The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, *but upon its practical operation and effect. Henderson v. Mayor of New York*, 92 U. S. 259, 268; *Stockard v. Morgan*, 185 U. S. 27, 36; *Galveston, Harrisburg & San Antonio Ry. Co v. Texas*, 210 U. S. 217, 227; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 28, 30; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 162; *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 362. . . .
>
> "Whether this legislation be regarded as a mere exercise of the power of regulation, or as a combination of regulation and taxation, the crucial inquiry under the Fourteenth Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power . . . . In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring

property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation."

In *Wagner v. City of Covington*, 251 U. S. 95, 102, this court said:

". . . and it is hardly necessary to repeat that when this court is called upon to test a state tax by the provisions of the Constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the State, but rather upon the *practical operation and effect of the tax as applied and enforced.* The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; neither can it render unconstitutional a tax, that in its actual effect violates no constitutional provision, by inaccurately defining it."

See also:

Minnesota v. Barber, 136 U. S. 313, 319;
Coppage v. Kansas, 236 U. S. 1, 15, 16;
American Mfg. Co. v. City of St. Louis, 250 U. S. 459, 462;
Macallen Co. v. Massachusetts, 279 U. S. 620, 625.

Well settled is it also that the invalidity of an act

may be shown by facts pleaded and established by evidence.

In *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, 410, that rule is announced.

> "Invalidity may be shown by things which will be judicially noticed (*Quong Wing v. Kirkendall*, 223 U. S. 59, 64), *or by facts established by evidence.*"

Now, if a purported taxing law in its practical operation or administration for a year and a half produces no revenue, but at the same time prohibits a lawful business, this fact is entitled to serious weight in determining whether it is a genuine taxing measure or a mere subterfuge.

In *Nigro v. United States*, 276 U. S. 332, 353, this court declared that if any doubt had existed as to whether the Harrison Act was a mere pretext or a genuine revenue measure, that doubt had been removed because the Government had obtained a substantial revenue under the act. It was said:

> "Thus the income from the tax for the Government becomes substantial. Under the Narcotic Act, as now amended, the tax amounts to about one million dollars a year, and since the amendment in 1919 it has benefited the Treasury to the extent of nearly nine million dollars. If there was doubt as to the character of this Act—that it is not, as alleged, a subterfuge—it has been removed by the change whereby what was a nominal tax before was made a substantial one. It is certainly a taxing act now as we held in the *Alston* case."

But no revenue has been derived by the State of Washington from the operation of the act of 1931. Finding of Fact XII is not only explicit on this point, but it also declares that since the effective date of the act no application has been made by anyone to the collector of internal revenue of the United States in the State of Washington for wholesale or retail licenses under the federal statute to sell oleomargarine in the state, that no such licenses have been issued to dealers in the state, and that the United States Government has not derived a single cent of revenue from sales of oleomargarine within the state.

During the period of a year and a half, therefore, the act produced no revenue. The tax was so high as to absolutely prohibit the business. But an alleged revenue measure which produces no revenue and destroys a legitimate business is inconsistent with the due process clause of the Fourteenth Amendment.

> "Everything," says Mr. Cooley, in his work on Constitutional Limitations, "that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government." (5th ed., p. 603)

In his work on Taxation, when speaking more directly to the question, he says:

> "If a revenue authority is what seems to be conferred, the extent of the tax, when not limited by the grant itself, must be understood to be left

to the judgment and discretion of the municipal government to be determined in the usual mode in which its authority to impose fees for purposes of revenue *would not warrant their being made so heavy as to be prohibitory thereby defeating the purpose.*" Cooley, Taxation (2d ed.) p. 599.

In *In re Quong Woo*, 13 Fed. 229, 233, Mr. Justice Field sitting at Circuit, said:

"Licenses for callings, trades, and employments may be required by the supervisors where the nature of the business demands special knowledge or qualifications on the part of the party, as in the case of dealers in drugs. They may also be required as a means of raising revenue for municipal purposes. But in neither case can they be required as a means of *prohibiting* any of the avocations of life which are not injurious to public morals, nor offensive to the senses, nor dangerous to the public health and safety. Nor can conditions be annexed to their issue *which would tend to such a prohibition.*"

In *McCray v. United States*, 195 U. S. 27, 64, this court said:

"Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for revenue but *solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the*

Constitution rests, that it would be the duty of courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred."

In the earlier case of *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, 237, in speaking of the state's power of taxation, this court said:

> "It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, *so long as they proceed within reasonable limits and general usage*, are within the discretion of the state legislature, or the people of the State in framing their Constitution."

The applicable principle is finely expressed in *Hager v. Walker*, 128 Ky. 1.

> "In considering this case we have not been unmindful that it is everywhere conceded that the power to lay taxes is the highest attribute of sovereignty, the exercise of which is confided alone to the law-making department of the government, and that the courts are reluctant to interfere with the discretion vested in the representatives of the people in imposing taxes that are necessary to sustain the government. Especially is this true of a property or ad valorem tax operating equally upon all property within

the territory affected. The amount of tax that shall be thus imposed, if uniform and not restrained by constitutional provisions, is vested exclusively in the legislative department of the state, and entirely beyond the power of the courts to control. *People v. Commissioners of New York City*, 67 U. S. 620, 17 L. ed. 451; *Union Pacific R. Co. v. W. S. Penniston*, 85 U. S. 5, 21 L. ed. 787. *But this unlimited freedom from judicial control does not extend to taxes imposed upon trades, occupations, or professions. Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. ed. 892; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. ed. 679. And the courts, when the question comes to them, have the undisputed right to determine whether or not a legislative act is in violation of the Constitution, although its purpose may be the raising of revenue."

See also

Child Labor Tax Case, 259 U. S. 20;
Hill v. Wallace, 259 U. S. 44;
St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346;
Trusler v. Crooks, 269 U. S. 475.

If, disregarding these principles, a state legislature, under the guise of enacting a revenue measure, can destroy a legitimate business, then the consequences will be appalling. Under such a doctrine the state could authorize an excise tax of $5 a pound on butter, thus destroying the dairy industry; of $10 a dozen on eggs, thus destroying the poultry industry; of

$100 per thousand feet of lumber, thus destroying the lumber industry. These illustrations, of course, might be multiplied indefinitely. It is no answer to assert that the legislature would not do any of these things, because the question is not what a wise legislature might do, but what any legislature constitutionally has the power to do.

The force of the contention that no revenue was obtained under the act was sought to be impaired in the court below by the unworthy insinuation that the appellant and all others similarly situated had deliberately taken a loss of many thousands of dollars and completely sacrificed their entire business and good will, which even when the statute was declared invalid it would obviously take many years to regain, for the sole purpose of "making a case for the courts," and this view apparently found favor in the minds of two members of the statutory court (2 Fed. Supp. 423).

There was, of course, not a shred of testimony which could even lend color to such a contention. In the absence of such testimony, it is difficult to see how a court can assume a state of facts so contrary to the primal instinct of self-preservation and to ordinary business experience. Not only so, but the idea that the appellant "quit trading to make a case" is absolutely *inconsistent* with the twenty-first finding of fact, which declares "That the complainant, after March 9, 1931, could not have sold any oleomargarine in the State of Washington *except at a loss*, because the said tax of fifteen cents per pound added to complainant's cost would make the price of oleomargarine

higher than that of butter." Surely it cannot be the law that a merchant must continue in business at a loss in order to avoid a pure assumption, that he went out of business at a great sacrifice in order to make a case for a court.

Somewhat allied to the proposition just discussed is another made by counsel for defendants in the court below, and which also found favor with two members of that court. It is said that "there is no evidence that dealing in oleomargarine is plaintiff's exclusive business. The inference is that such dealing is a line among others in its general business." What allegation, what finding of fact, what testimony adduced can give rise to the inference that the appellant is engaged in another line of business, we are at a loss to know. But assuming that appellant was engaged in another line of business and made either a profit or loss from that business, how could that fact deprive it of the right to engage in the lawful business which the state has destroyed? May a lawyer be disbarred because he has an income from sources outside his professional activities? May a druggist be deprived of the right to sell drugs solely because he may sell ice cream? Is an annual income of $20,000 to be taken away from the appellant herein simply because he may also engage in the selling of shoes, or books, or butter, or olive oil? If so, the people of this country are but a short distance from the caste system prevailing in Oriental countries, and which system it has hitherto been our proud boast was wholly alien to our institutions.

One of the members of the three-judge court ap-

parently did not approve of either the last two contentions, but based his concurring opinion upon the ground that the time which had elapsed (a year and a half) did not constitute a test period of reasonable length under the conditions which had existed. *How long does a citizen have to be deprived of his property before he can be permitted to complain of such deprivation?* The retail price of butter on the day the act was approved was 35c to 37c a pound. On the date of the final hearing of this case the retail price of butter was 24c to 26c a pound. On what conceivable theory could either the court below or anyone else conclude that in the next three months, or six months, or nine months, or any period of time, the price of butter would become so high that oleomargarine could be sold in competition with it after the payment of a tax of 15c a pound? We say that if and when such a condition should ever prevail, then will be the time to modify the decree to which the appellant is now entitled.

Defendants' Cases Distinguished

(c) Defendants in the court below also sought to find support for their view, that the state can prohibit indirectly by taxation what it could not constitutionally do directly, in certain dicta found in the decisions of this court.

For instance, great emphasis is placed upon the following statement in *Hammond Packing Co. v. Montana*, 233 U. S. 331:

> It [the state] even may forbid the manufac-

> ture [of oleomargarine] altogether. *Powell v. Pennsylvania*, 127 U. S. 678."

The Montana statute under discussion in the *Hammond* case imposed a tax of one cent a pound on the sale of oleomargarine. The single and only point presented for decision was that the tax constituted an *unlawful discrimination under the equal protection clause*. There was not even a suggestion that the tax was *prohibitory*. The sentence above quoted is, therefore, pure dictum. Moreover, it is wholly out of harmony with the holding of this court in *Schollenberger v. Pennsylvania*, 171 U. S. 1, *Adams v. Tanner*, 244 U. S. 590, and *Weaver v. Palmer Bros.*, 270 U. S. 402.

McCray v. United States, 195 U. S. 27, was also relied upon. That case involved a federal tax of 10c a pound on *colored* oleomargarine. The decision of this court is based upon the ground

> "that the manufacture of *artificially colored* oleomargarine may be prohibited by a free government without a violation of fundamental rights" because of "the aptitude of oleomargarine *when artificially colored*, to deceive the public into believing it to be butter." (pp. 64, 62)

In the case at bar, however, no question of deception, public health or police power is even remotely involved. That the point here presented was, to say the least, left open in the *McCray* case is shown by the following quotation from that opinion:

> "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain

> to the judicial mind that the power had been called into play *not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests*, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred."

The point here presented was also not decided in the cases of *Williams v. Fears*, 179 U. S. 270, and *Alaska Fish Co. v. Smith*, 255 U. S. 44, because in the first case it was said:

> "That the question of whether the tax was so excessive as to amount to a *prohibition* on the transaction of the business did not arise and, indeed, was not raised." (179 U. S. 273)

While in the *Alaska Fish Co.* case, Mr. Justice Holmes remarked that

> "We need not consider whether abuse of the [taxing] power might go to such a point as to transcend it, for *we have not such a case before us.*" (255 U. S. 49)

The tax imposed by the act in question also violates due process of law in that it is a tax for a private purpose, to aid the dairy industry.

It is, of course, elementary that the taxing power can be exercised for a public purpose only, and that a tax for a private purpose violates due process, regardless of the amount of the tax.

Loan Association v. Topeka, 21 Wall. 655;
Fallbrook Irrigation Co. v. Bradley, 164 U. S. 112, 113;
Green v. Frazier, 253 U. S. 233, 238, 239.

Any tax levied for a private purpose or in aid of a private individual or industry is unconstitutional and void, and this is but a specific illustration of the general principle that public power can never be exercised for a private purpose.

Now, the invalid purpose to aid the dairy industry appears from the very face of Chapter 23, Laws of 1931. By Section 2 of the act, the excise tax of 15c a pound is imposed "on all butter substitutes," which butter substitutes are, by Section 1(a) of the act, defined as certain oleaginous combinations "sold or used as a substitute for butter." By explicit provision of the act, then, oleomargarine, is only taxed as "sold or used as a substitute for butter." Oleomargarine as such, without regard to its relation to butter, is not taxed. The tax is applied when and only when oleomargarine is sold or used as a substitute for butter.

It is not and cannot be claimed that the act is a police power measure. Reference to the title of the act alone would make impossible such a claim. More-

over, there are various statutes in the State of Washington regulating the advertisement and sale of oleomargarine. The act, therefore, is in no sense a police power statute, and it follows that the butter substitute language contained in the act is used *solely to designate the subject-matter taxed*, and to make clear and distinctly point out that the tax applies when and only when the article is "sold or used as a substitute for butter."

Not only so, but it is apparent that the members of the legislature knew when they passed the act that the tax would be prohibitory. At that time the difference in the retail price of butter and oleomargarine was from 10c to 12c. Nevertheless, a tax of 15c a pound was imposed on the sale of oleomargarine. The members of the legislature, therefore, knew that at that time such a tax would not produce a dollar of revenue and would prohibit the sale of oleomargarine.

Moreover, the opinion of the court below is alive with the thought that the purpose of this act was to aid the dairy industry. Speaking of the dairy farmer, it is said:

> "'Bowed by the weight of centuries he leans upon his cane and gazes on the ground; the emptiness of the ages in his face, and on his back the burden of the world * * *' (this overdraws the condition somewhat, but challenges the thought to the contrast), may not have been as vivid as when the state legislature sought to, in some degree, balance the burden, and 'give back the upward looking and the light' and in-

spire in the farmer courage and hope of at least partial relief."

And again:

"Placing in competition the farmers with 306,000 cows in the state, with a butter production of 33,000,000 pounds and some by-products, with the plaintiff engaged in selling in the state more than 5,000,000 pounds of oleomargarine per annum (aside from others so engaged), requiring the cow and the farm which supports her to contribute to the maintenance of state and local government taxation, and affording protection to the dealer in the state of oleomargarine without contributing to the public tax for such support, challenges the state's power to keep alive."

And again:

"The court may judicially notice the distressing condition of agriculture, present in the mind of the legislators, not only in this state, but throughout the nation, *Atchison, etc., Ry. v. U. S.*, 284 U. S. 249, 254, 52 S. Ct. 146, 76 L. ed. 273, and the unusual economic conditions at the time and since the effective date of the act, and that by reason of the excessive burdens there exists an unrest which may not be superficially passed, and, in view of the burden placed upon the complainant to establish unlawful the tax, we find ourselves unconvinced that the act complained of is so palpably unreasonable and arbitrary as to be forbidden; * * *."

2 Fed. Supp. 422, 423, 424 (R. 48, 52, 53).

That legislation whose purpose it is to protect a

private individual or industry is unconstitutional and void is established not only by *Loan Association v. Topeka*, and the many cases following it, but is likewise ably demonstrated in the cases of *John F. Jelke Co. v. Emery*, 193 Wis. 311, *State v. Hanson*, 118 Minn. 85, and *People v. Marx*, 99 N. Y. 377.

In the first of these cases it was said:

> "We are next urged to hold the act valid on the ground that the Legislature, in order to protect the Wisconsin dairy industry from unfair competition, may prohibit the manufacture and sale of oleomargarine. There is no basis in the evidence upon which a claim of unfair competition can be based. The argument is addressed to the proposition that, in order to promote one important industry, the Legislature may, in the exercise of its power to promote the general welfare, cripple or destroy another competing industry. It has been supposed that the Constitution was devised for the express purpose of withdrawing from the Legislatures the power to do that very thing. The framers of our Constitution, particularly the earlier ones, were quite as zealous in guarding against encroachment upon personal liberty by Legislatures as by executives * * *.
>
> "Under the facts proven in this case, whatever the economics of the situation may be, from the standpoint of constitutional right the Legislature has no more power to prohibit the manufacture and sale of oleomargarine in aid of the dairy industry than it would have to prohibit the

raising of sheep in aid of the beef cattle industry, or to prohibit the manufacture and sale of cement for the benefit of the lumber industry. In some cases a proper exercise of the police power results in advantage to a particular class of citizens and to the disadvantage of others. When that is the principal purpose of the measure, courts will look behind even the declared intent of Legislatures, and relieve citizens against oppressive acts, where the primary purpose is not the protection of the public health, safety or morals."

In the *Hanson* case the Supreme Court of Minnesota stated:

"But a law that destroys competition between two products of equal merit, that precludes the public from purchasing what it wants, is surely meretricious, unless there is some question of public health or some danger of fraud or deception that makes such a law beneficial. Clearly no question of public health is involved; and there seems no danger of deception that at all compares with the advantages that come to the people by having their choice between the more expensive butter and the cheaper substitute."

Similar is the declaration in the case of *People v. Marx*, 99 N. Y. 377:

"Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price

of an article of food for the human race? Measures of this kind are dangerous, even to their promoters. If the argument of the respondents in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would arguments then be found wanting to demonstrate the invalidity under the constitution of such an act? The principle is the same in both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them.

"Illustrations might be indefinitely multiplied of the evils which would result from legislation which should exclude one class of citizens from industries, lawful in other respects, *in order to protect another class against competition.* We cannot doubt that such legislation is violative of the letter as well as of the spirit of the constitutional provisions before referred to, nor that such is the character of the enactment under which the appellant was convicted."

It is true that all three of the foregoing cases involved alleged exercise of the police power and not of

the taxing power, yet they, equally with *Loan Association v. Topeka*, 21 Wall. 655, demonstrate the principle that *a public power cannot be exercised for private purposes.* A law which deprives a citizen of his property, either by virtue of an excessive burden or by giving it to another for such other's benefit, is void, whether it is technically a law passed under the police power or the taxing power. The taxing power can no more be exercised to achieve such a result than can the police power. This, we think, is clearly demonstrated by the decision of this court in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 238, in which it is said:

> "In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, *rather than of private and particular interest*, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation."

Escape from this reasoning was sought to be predicated upon the view that the dairy farmers paid ad valorem taxes, while appellant, it was said (R. 49, 50), did not pay such taxes.

The answers are short and sharp. The premise that

appellant did not and does not pay such taxes is wholly unfounded and utterly inconsistent with Finding XI, which recites that the appellant "had and still has *within said state a large* amount of property *devoted to said business*" (R.59).

There was no testimony, either direct or from which even a remote inference could be drawn, that appellant does not pay taxes on this *large* amount of property, and surely the presumption is that the taxing officers did their duty and assessed the appellant's property. Moreover, a citizen's constitutional rights do not depend upon the amount of property he owns or the taxes he pays.

The Washington act constitutes an unlawful interference with the federal taxing power.

Congress, by an act which has long been on the books, has raised a large revenue from oleomargarine. It imposes a tax of 10c a pound on all colored oleomargarine, and a quarter of a cent a pound on all uncolored oleomargarine (U. S. Code, Title 26, §546, as amended March 14, 1931, ch. 520, §2; 46 Stat. 1549). In addition thereto, it imposes annual license fees, as follows: Upon manufacturers, $600; upon wholesalers of uncolored oleomargarine, $200; upon retailers of uncolored oleomargarine, $6 (U. S. Code, Title 26, §207).

Finding of fact XII is as follows:

> "That since the effective date of Chapter 23, Laws of 1931, no revenue has been received by the State of Washington under the provisions of

said act for the reason that, since said date, no sales of oleomargarine subject to tax under said act have been made; that since the effective date of said act no applications have been made to the collector of internal revenue of the United States in the State of Washington for wholesale or retail licenses under the Federal statutes to sell oleomargarine in the State of Washington, nor have any such wholesale or retail dealers' licenses been issued to dealers in the State of Washington under said Federal statutes since such date, *nor has the Government of the United States derived any revenue from sales of oleomargarine within the State of Washington since such date.*"

The fact, then, is that the legislature of the State of Washington, by levying a tax so great as to destroy completely the sale of oleomargarine within the State of Washington, has stripped the Federal Government of its entire revenue from that source within that state. By the same token, if the other forty-seven states of the Union should pass similar legislation and such legislation be held valid, the Federal Government would be completely stripped of a source of revenue which it has enjoyed for more than thirty years. If it be conceded that the forty-eight states have such power with respect to the taxation of oleomargarine, then it follows that the states, by levying prohibitive so-called excise taxes upon many other commodities, the tax on which supplies a large part of the internal revenue of the United States, can completely destroy the federal revenue from these sources.

The contention that we here make, that the Wash-

ington act of 1931 constitutes an unlawful interference with the federal taxing power conferred by Section 8 of Article I of the Constitution, is in no way in conflict with the principle that the state and federal governments have the power to tax the same subjects. That principle means no more than that the state government has the power, *within proper limitations*, to derive revenue from the same sources resorted to by the Federal Government. That principle, however, does not mean that the State of Washington in the purported exercise of its own taxing power (from which, according to the findings of fact, it derives no revenue itself) can completely destroy the federal revenue from the sale of oleomargarine. On the contrary, we say that because the powers conferred upon the Federal Government by the Constitution are paramount, the state cannot exercise its taxing power so as to render the federal taxing power wholly nugatory. The consequences of the opposite view were visioned by Mr. Justice Brewer, writing the opinion in *South Carolina v. United States*, 199 U. S. 437, 454, in which it was held that agents of the state engaged in the sale of intoxicating liquor were not relieved from the payment of the internal revenue tax imposed on such liquor by the United States Government. He said:

> "Mingling the thought of profit with the necessity of regulation may induce the state to take possession, in like manner, of tobacco, *oleomargarine*, and all other objects of internal tax. If one state finds it thus profitable, other states may

follow, *and the whole body of internal revenue tax be thus stricken down.*

"* * *. Indeed, if *all the states* should concur in exercising their powers to the full extent, it would be *almost impossible* for the nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically *destroy the efficiency of the National Government.* If it be said that the States can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the National Government, we may turn to the opinion of Mr. Chief Justice Marshall in *McCulloch v. Maryland, supra* (p. 431), for a complete answer:

" 'But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.'

"In other words, we are to find in the Constitution itself the full protection of the Nation,

and not to rest its sufficiency on either the *generosity* or the *neglect* of any State."

In an analogous situation involving the commerce clause, this court said in *Minnesota v. Barber*, 136 U. S. 313, 331:

> "On the contrary, the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. A careful examination of the Minnesota act will place this construction of it beyond question."

The principle that we advance is thus stated by Mr. Justice Gray in *Van Brocklin v. Tennessee*, 117 U. S. 151, 155:

> "While the power of taxation is one of vital importance, retained by the States, not abridged by the grant of a similar power to the government of the Union, but to be concurrently exercised by the two governments, yet *even this power of a State is subordinate to*, and *may be controlled by*, the Constitution of the United States. That Constitution and the laws made in pursuance thereof are supreme; they control the constitutions and laws of the respective States, and cannot be controlled by them. The people of a State give to their government a right of taxing themselves and their property at its discretion. But the means employed by the government of the

Union are not given by the people of a particular State, but by the people of all the States; and being given by all, for the benefit of all, should be subjected to that government only which belongs to all. All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. *The attempt to use the taxing power of a State on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.* The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, *which other, with respect to those very measures, is declared to be supreme over that which exerts the control. The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.*"

The same view is plainly indicated in *Schollenberger v. Pennsylvania*, 171 U. S. 1, 19, in the following passage:

> *"We think that what Congress thus taxes and recognizes as a proper subject of commerce cannot be totally excluded from any particular State simply because the State may choose to decide that for the purpose of preventing the importation of an impure or adulterated article it will not permit the introduction of the pure and unadulterated article within its borders upon any terms whatever."*

There is, of course, no doubt, as is held in *Flaherty v. Hanson*, 215 U. S. 515, and cases there cited, that a state cannot directly "place a burden on the lawful taxing power of the United States." And *Van Brocklin v. Tennessee, supra*, directly recognizes that the federal taxing power is paramount, and cannot be destroyed by state legislative measures. In *Lane County v. Oregon*, 7 Wall. 71, 76-78, Chief Justice Chase, speaking for the court, recognized that the taxing power of the state and federal governments over certain subjects is concurrent; but he further states that the concurrent power of the state "must not be so used as to embarrass or burden the federal government."

The foregoing authorities, therefore, declare that while the power of the state and federal governments over the same subject matter may be concurrent, yet, in the event of a conflict between the two, the power of Congress is supreme. In other words, the power of the state is concurrent with and independent of the

power of Congress where the same subject matter is taxed *only* to the point where an actual and substantial interference with the taxing power of Congress arises, in which event, the taxing power of Congress is paramount. This thought is expressed by Chief Justice Taney in his opinion in the License Tax Cases, 5 How. 513, 521, where he says:

> "The supremacy of the laws of Congress in cases of collision with state laws is secured in the article which declares that the laws of Congress passed in pursuance of the powers granted shall be the supreme law; and it is only where both governments may legislate on the same subject that this article may operate."

We may readily concede that the state could, in the exercise of its taxing power, destroy any business, *which it could destroy under its police power*, and thus destroy the federal revenue from such business. But such concession cannot aid appellees because the challenged act is not a police power measure and the oleomargarine business is no longer one which the state can completely prohibit.

Schollenberger v. Pennsylyvania, 171 U. S. 1;

Collins v. New Hampshire, 171 U. S. 30;

Weaver v. Palmer Bros. Co., 270 U. S. 402.

We, therefore, respectfully submit on this branch of the argument that the Washington act here challenged is invalid because the tax imposed by that act is so great as to destroy the legitimate business of selling oleomargarine in the state, and thus ren-

ders it impossible for the federal government to receive any revenue whatsoever from persons formerly engaged in that business.

Admitting, for the purposes of the present case, the power of the state to levy a reasonable tax on oleomargarine, a tax in an amount not great enough to prohibit the collection of revenue by the federal government from that source, we, nevertheless, respectfully submit that any state tax which is completely destructive of the federal revenue would, if held valid, permit the states to strike down the entire internal revenue system of the United States, and thus permanently to cripple the federal government; and that this is particularly true of a tax law that is not a genuine tax law, that raises no revenue for the state, destroys a legitimate business, and destroys with it a substantial source of federal revenue.

Nor does anything said in *Plumley v. Massachusetts*, 155 U. S. 461, weaken the force of the argument just made. In that case (decided in 1894) it appears that Massachusetts had passed an act entitled "An act to *prevent deception* in the manufacture and sale of imitation butter." It made criminal the sale of oleomargarine "which shall be in imitation of *yellow* butter." The statute, therefore, was a pure police power measure. Plumley, having been convicted in the state courts, sought on appeal to have this court declare that because Congress, by the act of 1886, had placed a tax on oleomargarine, the Massachusetts act, passed for the purpose of *protecting its*

people from deception, was void. That contention was refuted in the following language:

> "The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which *lawfully forbade* such manufacture or sale, or to disregard any regulations which a State might *lawfully* prescribe in reference to that article."

True, the court called attention to §3243 of the Revised Statutes, which provides, in part:

> "nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes."

But certainly the clause just quoted must be given a reasonable construction, and therefore Congress can only be presumed to have intended that the exercise of its taxing power upon a commodity should not "prohibit any State from placing a (reasonable) duty or excise on the same trade or business." It can hardly be presumed that Congress, speaking of its own exercise of the taxing power, was in the same breath conceding to the states the power to levy a *prohibitory* tax, a tax which is in reality not a tax at all, from which the state derives no revenue, and which would render the exercise of the congressional power of taxation wholly nugatory. Congress was merely conceding the states' right to levy a reasonable revenue-producing tax, and not one which was so unreasonable as to yield the state no revenue and

at the same time destroy all federal revenue from that source. It cannot be presumed, from the language of the clause of the act just quoted, that Congress intended to give to the states a power by which "the whole body of internal revenue tax [might] be thus stricken down," and thus "practically destroy the efficiency of the National Government" (199 U. S. 454, 455).

The Washington act complained of violates the commerce clause of the Federal Constitution.

The amount of the tax imposed by the 1931 act is so burdensome as to destroy interstate commerce in oleomargarine, because the tax burdens that commerce not merely incidentally but has directly and completely destroyed the entire business of importation carried on by the appellant prior to the approval of the act.

The findings of fact state that for many years prior to the passage of the act the appellant imported oleomargarine from the State of California for the purpose of sale in the State of Washington, but that since March 9, 1931, it has not imported any oleomargarine from California or sold any oleomargarine, for the sole reason that by virtue of the threats of the defendants to enforce the act oleomargarine could not be sold except at a loss (Findings Nos. V and XI).

The excessive tax, therefore, imposed by the Washington act has put a complete stop to the interstate importation previously carried on by the appellant.

"The practical effect" of the act, therefore, has been to destroy the interstate commerce previously conducted by the appellant.

It is true that by Section 13 of the act the legislature declared it had no intention to violate the commerce clause of the Federal Constitution, yet this declaration can be of no force and effect under the decisions of this court heretofore cited and quoted, if the act, *in its practical working and operation*, constitutes an unlawful burden on interstate commerce.

In the *Schollenberger* case it appears that the State of Pennsylvania had undertaken by legislation to prohibit the sale of oleomargarine in that state. By *necessary implication*, the statute prohibited the sale of *imported* oleomargarine. This court, reversing the Supreme Court of Pennsylvania, held that the manufacture of oleomargarine was lawful, and that the article could not be completely excluded from the state, because such exclusion of a legitimate article of commerce constituted a violation of the commerce clause.

The New Hampshire statute involved in the case of *Collins v. New Hampshire* did not in terms prevent the sale of imported oleomargarine, nor did it even expressly undertake to prohibit the sale at all, but it provided that oleomargarine could only be offered for sale provided it was colored pink. This court held that on account of the provision requiring pink coloring, the statute, "in practical effect," prevented *all* sales of oleomargarine, and therefore prevented *im-*

portation for the purpose of sale and thus *directly restrained interstate commerce.*

It follows, from the doctrine of these two cases, that any legislation which has "the practical effect" of prohibiting the introduction of oleomargarine from one state into another, for the purpose of sale, constitutes a violation of the commerce clause. The Pennsylvania and the New Hampshire acts referred to did not *in terms* prevent the importation into the states of Pennsylvania and New Hampshire of oleomargarine. What they did do was to prevent the sale of oleomargarine after it was imported into the state, and thus rendered the importation absolutely useless.

The Washington act here challenged, in its legal incidents, is exactly the same as the Pennsylvania act. The challenged act does not impose an excise tax on the appellant's imports from the State of California, but it does impose a tax upon all sales made within the state, and Section 11 of the act provides that if oleomargarine is received under circumstances where the distributor is tax-free under the Constitution of the United States, the person next in line who is within the taxing power of the state must pay the tax. The legislature, therefore, has so drawn the act that the commodity imported by the appellant from without the state cannot escape the tax, and can only come into the hands of the consumer with the excessive tax paid. *The price of the commodity is thus raised so as to render its sale absolutely impossible.* The ultimate consumer will not buy because the price of the article with the tax paid is greatly in excess

of the price of butter. The retailer will not buy from the appellant because, if he bought the commodity with the tax paid, he could not, because of its excessive cost, sell it in competition with butter; and the appellant cannot buy because it is impossible for it, under the circumstances, to sell to the retailer. "The practical effect" of the act is, therefore, to prevent all importation of oleomargarine for the purposes of sale by the appellant and all others similarly situated.

As late as *Macallen v. Massachusetts*, 279 U. S. 620, 626, 627, this court has said:

> "A tax laid in terms on the occupation of an importer is in effect a tax on imports. *Brown v. Maryland*, 12 Wheat. 419, 444. Answering the contention that a state may tax an occupation, and that this tax was nothing more, Chief Justice Marshall said:
>
> " 'It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. . . . *So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not the*

right to do, because it is prohibited by the constitution.'

. . .

"A tax on sales made by an auctioneer is a tax on the goods sold, and, where such goods are imported and sold for the importer, the law authorizing the tax is void as imposing a duty on imports. *Cook v. Pennsylvania*, 97 U. S. 566.

"A stamp tax upon a bill of lading is in substance and effect a tax upon the things transported, because of its necessary association with the shipment. *Almy v. California*, 24 How. 169, 174. And see *Woodruff v. Parham*, 8 Wall. 123, 138."

It seems almost too plain for argument, then, that interstate commerce, as previously carried on by the appellant and recognized as legitimate in the *Schollenberger* and *Collins* cases, is directly burdened by this tax and is completely prohibited and destroyed.

It is no answer to the foregoing argument to say that the act does not in terms prohibit interstate commerce, or that the act undertakes expressly to negative any intention to interfere with interstate commerce, when the "practical effect" of the imposition of the tax is to make it impossible to sell within the state the commodity theretofore imported from without the state. The prohibitory result, even if thus achieved by devious means, is just as unconstitutional by reason of its "practical affect" as if the prohibition were imposed directly.

Nor is it any answer to say that if the tax were only one or two cents a pound, and the commodity could thus ultimately be sold in competition with but-

ter, no unconstitutionality under the commerce clause would result in such event. It may be readily conceded, for the purposes of the present case, that a tax of one cent or two cents, or probably more, a pound, would not render the act violative of the commerce clause, because the commodity could still ultimately be sold at a profit and in competition with butter. But a tax of fifteen cents a pound, which, under the findings of fact, makes importation from without the state *useless*, because it renders *ultimate sale impossible, is* nevertheless violative of the commerce clause and is squarely within the rulings in the *Schollenberger* and *Collins* cases.

The Washington act is further violative of the commerce clause because it, in legal effect, amounts to a protective tariff, which the state has no power to impose. The act imposes a tax, in legal effect, upon oleomargarine imported from without the state, and leaves a directly competing commodity, to-wit, butter, untaxed. A state has no power to levy a protective tariff against foreign commodities for the protection of competing local commodities.

In *Gramling v. Maxwell*, 52 F. (2d) 256, 258, a three-judge federal court recently said:

> "But the state may not, in its tax on peddlers or other taxes, *discriminate against the products of other states.* To do so is in effect to *enact a protective tariff* against the products of other states; and a tax which makes such discrimination is violative of clause 3 of section 8 of the first article of the Constitution of the United

States, because it *constitutes a burden upon interstate commerce.*"

In *Darnell v. Memphis*, 208 U. S. 113, 122, this court said, quoting from *Walling v. Michigan*, 116 U. S. 446, 455:

> "A discriminating tax imposed by a state operating to the disadvantage of the products of other states when introduced into the first mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

And in *Walling v. Michigan*, 116 U. S. 446, 457, 458, the following language from a Missouri case is approved by the Supreme Court of the United States:

> "But whatever may be the motive for the tax, whether revenue, restriction, retaliation, or protection of domestic manufactures, it is equally a regulation of commerce, and, in effect, an exercise of the power of laying duties on imports, and its exercise by the states is entirely at war with the spirit of the constitution, and would render vain and nugatory the power granted to Congress in relation to those subjects. Can any power more destructive of the union and harmony of the States be exercised than that of imposing discrimatory taxes or duties on imports from other states? Whatever may be the motive for such taxes, they cannot fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state

of feeling that would seek its gratification in any measures regardless of the consequences."

It follows, therefore, that the Washington act under attack in its *practical operation* taxes imported oleomargarine, leaving the competing local commodity, butter, untaxed, and thus constitutes an unlawful discrimination under the commerce clause.

But even if the act did not discriminate against imported goods *as such*, the result would be the same.

In *Schollenberger v. Pennsylvania*, 171 U. S. 1, the law applied to intrastate commodities as well as to commodities imported from without the state, without discrimination, but this did not save the law from condemnation under the commerce clause.

And in *Minnesota v. Barber*, 136 U. S. 313, 326, this court said:

> "It is, however, contended, in behalf of the State, that there is, in fact, no interference, by this statute, with the bringing of cattle, sheep and swine into Minnesota from other States, nor any discrimination against the products or business of other States, for the reason—such is the argument—that the statute requiring an inspection of animals on the hoof, as a condition of the privilege of selling, or offering for sale, in the State, the meats taken from them, is applicable alike to all owners of such animals, whether citizens of Minnesota or citizens of other States. *To this we answer, that a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by*

a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute. Robbins v. Shelby Taxing District, 120 U. S. 489, 497; Case of the State Freight Tax, 15 Wall. 232. *The people of Minnesota have as much right to protection against the enactments of that State, interfering with the freedom of commerce among the States, as have the people of other States. Although this statute is not avowedly, or in terms, directed against* the bringing into Minnesota of the products of other States, *its necessary effect* is to burden or obstruct commerce with other States, as involved in the transportation into that State, for purposes of sale there, of all fresh beef, veal, mutton, lamb or pork, however free from disease may have been the animals from which it was taken."

It is respectfully submitted, therefore, that the Washington act complained of violates the commerce clause of the Federal Constitution, because it completely prohibits, in its practical operation, importation of goods from without the state for the purpose of sale,—contrary to the rulings in *Schollenberger v. Pennsylvania*, 171 U. S. 1, and *Collins v. New Hampshire*, 171 U. S. 30.

The sole answer attempted to be made to this argument in the court below was the citation of the case of *Sonneborn Bros. v. Cureton*, 262 U. S. 506. That case is not an authority against us, but sustains the

very position for which we contend, as is demonstrated by the following language (pp. 513, 514):

> "Without questioning the reasoning used to reach the conclusion in *Leisy v. Hardin*, it is enough to point out the radical difference between state legislation *preventing any sale at all* accompanied by forfeiture of the merchandise, and a provision for an occupation tax applicable to all sales of such merchandise whether domestic or brought from another State. *The one plainly interferes with or destroys the commerce*, the other merely puts the merchandise on an equality with all other merchandise in the State and *constitutes no real hindrance to introducing the merchandise into the State for sale* upon the basis of equal competition. Mr. Justice White in his opinion in *American Steel & Wire Co. v. Speed*, thus distinguished *Leisy v. Hardin* from the case then before the Court. *The obstruction to interstate commerce in Leisy v. Hardin was like that in Schollenberger v. Pennsylvania*, 171 U. S. 1, 12, in *Railroad Co. v. Husen*, 95 U. S. 465, 469, in *Minnesota v. Barber*, 136 U. S. 313, in *Brimmer v. Rebman*, 138 U. S. 78, in *Scott v. Donald*, 165 U. S. 58, 97, in *Vance v. Vandercook Co., No. 1*, 170 U. S. 438, and in *American Express Co. v. Iowa*, 196 U. S. 133."

In the *Sonneborn* case, therefore, this court made it convincingly clear that any state legislation which "prevents any sale at all" of articles imported from without the state for the purpose of sale is invalid, because it "plainly interferes with and destroys com-

merce," and that legislation applicable to articles imported from without the state for the purpose of sale is valid *when and only when* the legislation "constitutes *no real hindrance* to introducing the merchandise into the state for sale."

The practical operation and effect of the Washington act achieves the very consequence which Chief Justice Taft in the *Sonneborn* case said *could not be achieved.*

Again, we readily concede that the *Sonneborn* case permits a reasonable excise tax on merchandise imported from without the state for purpose of sale within the state because such tax "constitutes *no real hindrance* to introducing the merchandise into the state for sale"; but where the tax is so great as not only to constitute a "real hindrance" but wholly prevents "the introduction of the merchandise into the state for sale," such legislation conflicts with the decision in the *Sonneborn* case as well as the holding in *Schollenberger v. Pennsylvania.*

It was suggested in the court below that because, under the present Washington act, a private consumer could order oleomargarine direct from a seller located without the state, said sale being consummated without the state, the commerce clause was not violated. But such a construction of the commerce clause is far too narrow, and wholly misconceives the effect of the decision in the *Sonneborn* case. If that view were correct, then it would follow that the only interstate transaction now protected by the commerce clause is a sale made from without the state directly to a consumer within the state. Under that view, the

commerce clause would be reduced to protecting business transactions within this narrow compass.

But if the commerce clause merely protects a cumbersome and expensive mail order business conducted from without the state, it has, indeed, lost vitality. Such is not the law. It had been the law long before *Schollenberger v. Pennsylvania*, and has been the law at all times since, that an article imported from without the state for the purpose of being thereafter sold within the state is entitled to the protection of the commerce clause against unduly burdensome state legislation.

The findings of fact show that since 1919 the appellant had been importing oleomargarine from without the state for the purpose of making sales thereafter within the state. The state cannot today impose an undue burden upon this method of conducting interstate commerce. Legislation relative to such transactions is only valid if it, in the language of the *Sonneborn* case, "constitutes no real hindrance to introducing the merchandise into the state for sale;" and that phrase unquestionably means no real hindrance to introducing the merchandise *into the state for sale*, to-wit, for sale *after its introduction*.

The only other reply attempted by counsel for defendants in the court below, is the following:

> "If the premise were well founded, viz: that the act was designed to and does in fact prohibit all trade in oleomargarine, the conclusion might be sound but as we have already indicated, the court is not warranted in finding that the act

is other than its context implies, a taxing measure."

But a statute which, in a year and a half between the time of its becoming effective and the final hearing in this case, did not and could not produce one cent of revenue to the state, can hardly be called a taxing measure.

CONCLUSION

In conclusion we say:

1. That the oleomargarine business is a legitimate business which cannot be destroyed in the exercise of the police power, and therefore cannot be destroyed in an alleged exercise of the taxing power.

2. That an alleged exercise of the taxing power which, as in the present case, produces no revenue whatsoever, is an abuse of power when applied to a legitimate business.

3. That it is almost universally conceded that an occupational tax prohibitive in amount is violative of due process of law, and that while the power of the legislature to levy an unlimited ad valorem or property tax may be conceded, nevertheless, a tax upon a legitimate occupation is constitutional only when reasonable in amount, and not destructive of the business.

4. That if it be conceded that the legislature, by a prohibitive occupational tax, has the power to destroy a legitimate business, then it must likewise be conceded that a legislature has the power, by excessive occupational taxes, to destroy every legitimate merchandising business.

5. That a tax which is imposed, not for a public purpose but in aid of a competing private industry, to-wit, the dairy industry, constitutes a deprivation of due process of law.

6. That a tax which in its practical effect completely prevents the importation of goods into a state from other states for the purposes of sale constitutes an unlawful burden upon and a prohibition of interstate commerce, in violation of the commerce clause of the Constitution.

7. That a tax which discriminates against goods brought in from without the state in favor of a competing commodity produced within the state constitutes a violation of the commerce clause.

8. That any tax, whether discriminatory or not, and even though not completely prohibitory, which imposes a real hindrance to interstate commerce, is unconstitutional and void under the commerce clause.

9. That a state tax which unlawfully burdens the taxing power of the United States, by completely destroying the federal revenue, is unconstitutional and void, because of the supremacy of the laws of Congress under the express language of the Federal Constitution.

Respectfully submitted,

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APPENDIX

Chapter 23
(Session Laws, 1931, p. 77)

EXCISE TAX ON SALE OF BUTTER SUBSTITUTES

AN ACT relating to revenue and taxation, requiring distributors as therein defined to pay an excise tax on the sale of all butter substitutes, providing for licensing dealers therein, fixing a penalty for a violation of the provisions of the act, and declaring that this act shall take effect immediately.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. (a) The term "butter substitute" whenever used in this act shall be held and construed to mean and include any compound or compounds of animal or vegetable fats, such as tallow, beef fat, suet, lard, lard oil, suine, lardine, intestinal fat, offal fat, cocoanut oil, olive oil, cottonseed oil, peanut oil, in combination with milk, butter or any product of milk or butter, either colored or uncolored, that does not contain eighty per cent (80%) of milk or butter fat, and is sold or used as a substitute for butter.

(b) The term "distributor" whenever used in this act shall be held and construed to mean and include any person, firm or corporation which produces, refines, manufactures or compounds and thereafter sells such butter substitute in the state of Washington for use and sale in this state, or who imports and sells such butter substitute into this state, except as hereinafter provided.

Sec. 2. That in addition to the taxes now provided

for by law each and every distributor, as defined in this act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of representatives or agents in this state, in the sale of butter substitutes as herein defined, shall not later than the fifteenth day of each calendar month render a sworn statement to the director of agriculture of the State of Washington of all such butter substitute sold by him or them in the state of Washington during the preceding calendar month, and pay an excise tax of fifteen cents per pound on all butter substitutes so sold as shown by such statement in the manner and within the time hereinafter provided.

Sec. 3. All distributors of such butter substitutes in the state of Washington shall file a duly acknowledged certificate with the director of agriculture on forms prescribed, prepared and furnished by him, which shall contain the name under which such distributor is transacting business within the state of Washington; such certificate shall state the place or places of business and location of distributing stations of the distributor in the state of Washington, the name and address of the manufacturing agent, the names and addresses of the several persons constituting the firm or partnership, and if a corporation the corporate name under which it is authorized to transact business, and the names and addresses of its principal officers, resident general manager and attorney-in-fact. If such distributor is an association of persons, firm, partnership or corporation organized under the laws of another state, territory or nation,

if it has not already done so, it must first comply with the laws of the state of Washington relating to the transaction of its appropriate business therein. No distributor, as herein defined, shall, after the law goes into effect, sell any butter substitute until such certificate is furnished, as required by this act.

Sec. 4. Every distributor of such butter substitute shall render to the director of agriculture of the state of Washington, on or before the fifteenth day of each month, on form prescribed, prepared and furnished by said director, a sworn statement of the number of pounds of butter substitute sold by it, him or them during the preceding calendar month, which statement shall be sworn to by one of the principal officers in case of a domestic corporation, or by the resident general manager or attorney-in-fact in case of a foreign corporation, or by the managing agent or owner in case of a firm or association, and shall contain a statement of the quantities in pounds of butter substitute sold. Bills shall be rendered to dealers in butter substitutes as herein defined. Said bills shall contain a statement printed thereon in a conspicuous place that the distributor of such butter substitute has assumed the liability to the state for the license tax therein imposed and that he, it or they will pay said license tax on or before the fifteenth day of the following month.

Sec. 5. Said excise tax shall be paid on or before the fifteenth day of each month to the director of agriculture of the state of Washington, who shall receipt the distributor therefor and place the same in the

state treasury to the credit of the general fund of the state of Washington.

Sec. 6. Every distributor of such butter substitute shall keep a record of such forms as may be prescribed by the director of agriculture of all purchases, receipts, sales and distributions of such butter substitutes, and such record shall at all times during the business hours of the day be subject to inspection and examination by the director of agriculture, or his deputies, or such other officers as may be provided by law.

Sec. 7. All butter substitutes sold in containers, packages or cases shall bear a sticker tag showing the date of invoice upon which the same was delivered, the name of the distributor of such butter substitutes, and shall contain in a statement that the liability for the license tax thereon has been assumed by such distributor.

Sec. 8. It shall be unlawful for any person, firm or corporation dealing in butter substitute to receive or accept any delivery or shipment of butter substitute from any distributor or to pay for the same, or to sell or offer the same for sale, unless the statement provided for in section seven (7) appears upon the container and upon all invoices for such butter substitute. If any shipment of butter substitute is received by any person, firm or corporation from any distributor, or is sold or offered for sale by him or them, upon which the requirements of sections 4 and 7 of this act are not complied with, such person, firm or corporation shall be deemed guilty of a misdemeanor. Provided, That the provisions of this

section shall not apply to the receipt or sale of butter substitutes which are exempt from state tax under the constitution and laws of the United States.

Sec. 9. The director of agriculture shall have the power and it shall be his duty from time to time, to adopt, publish and enforce rules and regulations not inconsistent herewith for the purpose of carrying out the provisions of this act.

Sec. 10. Said excise tax shall not be imposed on butter substitutes when sold for exportation from the state of Washington to any other state, territory or nation: Provided, however, The distributor or exporting agent shall make a statement each month to the director of agriculture showing the amount of butter substitute exported.

Sec. 11. If any person shall receive such butter substitutes in such form and under such circumstances as shall preclude the collection of this tax from the distributor by reason of the provisions of the constitution and laws of the United States, and shall thereafter sell such butter substitute in such manner and under such circumstances as may subject such sale to the taxing power of the state, such person shall be considered a distributor and shall make the same reports, pay the same taxes and be subject to all the other provisions of this act relating to distributors of butter substitutes.

Sec. 12. Any distributor, association of persons, firm or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor.

Sec. 13. Nothing in this act contained shall be construed to require the payment of the excise tax

herein provided for, or the doing of any acts which would constitute an unlwaful burden upon the sale or distribution of butter substitutes as herein defined, in violation of the constitution or laws of the United States.

Sec. 14. If any section, subdivision, sentence or clause of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portion of the act.

Sec. 15. Whereas the revenues of the state are insufficient to support the state government and its existing public institutions as at present organized and this act will furnish additional and necessary revenues now required by this state, and will aid in the immediate preservation of the public peace, health and safety, therefore this act is necessary for the immediate preservation of the public peace, health and safety, support of the state government and its existing public institutions and shall take effect immediately.

Passed the Senate February 27, 1931.

Passed the House February 26, 1931.

Approved by the Governor March 9, 1931.